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LEGAL PRACTICE



Sexual harassment at work – significant changes to the law

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Date: Monday January 31, 2022

On 11 November 2021, the *Fair Work Act 2009* ("**the Act**") was amended to allow a person to apply to the Fair Work Commission ("**the Commission**") for orders to stop sexual harassment at work. The new Federal laws cover workers nationwide and are aimed at improving protection and increasing empowerment of workers in relation to workplace sexual harassment.

What is a 'stop sexual harassment' order?

A 'stop sexual harassment order' is an order that aims to prevent a worker from being sexually harassed at work.

When is a person eligible to apply for a 'stop sexual harassment' order?

A person is eligible to apply for an order to stop sexual harassment at work if they:

- Are a worker (as defined in the *Work Health &Safety Act 2011* (Cth));
- Are not a member of the defence force; and
- Experience sexual harassment while at work in a constitutionally-covered business.

Who is a worker?

Notably, for the purposes of this legislation, a ‘worker’ does not only refer to employees. A worker is a person who carries out work in **any** capacity for a person conducting a business or undertaking, including any of the following:

- An employee;
- A contractor or subcontractor;
- An employee of a contractor or subcontractor;
- An employee of a labour hire company who has been assigned to work in the person’s business or undertaking;
- An outworker;
- An apprentice or trainee;
- A student gaining work experience;
- A volunteer – except a person volunteering with a wholly “volunteer association” with no employees (whether incorporated or not).

What is a constitutionally-covered business?

A constitutionally covered business includes:

- a proprietary limited company;
- a foreign corporation;
- a trading or financial corporation formed within the Commonwealth;
- the Commonwealth and the Commonwealth authority;
- a body corporate incorporated in a territory; and
- a business or organisation conducted principally in a territory or Commonwealth place.

The majority of incorporated employers in the private sector that sell goods or provide services to customers will be ‘constitutionally-covered businesses’.

Sexual harassment definition

The term “sexually harass” has the same meaning as that in section 28A of the *Sex Discrimination Act*. A person sexually harasses another person if:

1. *They make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or*
2. *They engage in other unwelcome conduct of a sexual nature in relation to the person harassed;*

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated, or

intimidated.

Sexual harassment can be a single incident or something that happens more than once and may constitute a sexual advance, a request for sexual favours or other conduct of a sexual nature. Examples include:

- Sexually suggestive comments or jokes;
- Intimidating or threatening behaviours, such as inappropriate staring or leering, sexual gestures, or following, watching, or loitering;
- Inappropriate physical contact, such as deliberately brushing up against a person, or unwelcome touching, hugging, cornering, or kissing.
- Making a statement of a sexual nature in the presence of the person

Whether or not the conduct is ‘unwelcome’ is a subjective question and turns on the attitude of the recipient of the conduct. The intention of the person responsible for the conduct is not relevant. Unwelcome conduct has been described as being:

- conduct that is not solicited or invited, which the recipient regards as undesirable or offensive;
- conduct that is disagreeable to the person to whom it is directed.

What does ‘at work’ mean?

The phrase ‘at work’ is not defined in the legislation. However, the term has been previously considered by the Commission in relation to bullying matters. It has previously been determined that:

- the conduct does not need to have been committed by other employed workers. In other words, the conduct may be committed by a customer, sales representative or visitor to the employee’s place of work.
- there is no requirement that the employee has to actually be ‘at work’ at the time of the conduct. In other words, being ‘at work’ is not limited to a specific workplace or the times during which the worker generally performs work. It can include performance of work at any time or location as well as when the worker is engaged in some other activity which is authorised or permitted by their employer (eg: attending a work social event, conference or other work-related activity).

What must the Commission consider when determining whether to make an order?

In order to make a ‘stop sexual harassment’ order, the Commission must be satisfied that a person has been sexually harassed at work by an individual or individuals and that there is a risk the person will continue to be sexually harassed at work by that individual or individuals.

A person, however, does not need to show that sexual harassment poses a risk to their health and safety.

When determining whether orders can be made to ‘stop sexual harassment’, the Commission should consider:

- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour or national or ethnic origin, of the person harassed;
- the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- any disability of the person harassed;
- any other relevant circumstances.

What orders can the Commission make?

The Commission can make any order it considers appropriate to prevent a person from being sexually harassed at work. However, the Commission cannot order the payment of compensation to a worker who has been sexually harassed.

Orders that may be made include those:

- preventing workers from being in the same room as each other;
- requiring workers to report to different managers;
- ordering businesses to conduct training or update their policies or procedures;
- requiring the regular monitoring of a worker's behaviour.

Are there time limits to make an application for a 'stop sexual harassment order'?

There is no timeframe within which a worker must lodge an application for an order to stop sexual harassment.

However, an application for an order won't succeed if the person no longer has a connection to the workplace (for example, they have resigned or retired). This is because there will not be any risk that the person will continue to be sexually harassed at work.

What if I am not eligible to make an application for a 'stop sexual harassment order'?

If a person is unable to seek assistance from the Commission, they may nevertheless be able to commence other action against a person under human rights laws, anti-discrimination laws and equal opportunity laws.

What can businesses do to manage sexual harassment?

'Stop sexual harassment orders' can be very onerous and expensive for businesses. Businesses should take sexual harassment seriously and can help prevent sexual harassment by:

- creating a safe physical and online working environment for employees;

- updating and implementing policies and procedures targeted at eliminating sexual harassment;
- addressing unwanted or offensive behaviour;
- encouraging the reporting of sexual harassment;
- actively stamping out sexual harassment in the workplace.

It is important for businesses to remember that sexual harassment is considered serious misconduct and can be a valid reason for dismissal.

Get help from an employment lawyer

There is currently a high level of awareness of sexual harassment in the workplace and it is important that employees understand their rights and employers have in place policies and procedures to target and eliminate sexual harassment.

The law in relation to sexual harassment can become complex and should you seek assistance in this area, please contact us.

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